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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

LEA SPEARS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Lea Spears, who is not a licensed practicing physician, was convicted for the crime of abortion in the Circuit Court of Warren County. An appeal from that conviction was taken to the Supreme Court of Mississippi, wherein the conviction was affirmed without a written opinion. *Spears v. State,* 257 So.2d 876 (Miss. 1972). Petitioner seeks to have this Court grant certiorari in order to review the decision of the Mississippi Supreme Court.

ARGUMENT

A review of the trial record and briefs filed with the Supreme Court of Mississippi in *Spears* v. *State*, No. 46,645, the Supreme Court of Mississippi, from which petitioner now seeks review, shows that the issues as to the validity of Mississippi's abortion statute[1] were not presented below. Petitions for Certiorari will be denied by this Court when the issues raised have not been presented to the state courts. *Monks* v. *New Jersey*, 398 U.S. 71, 26 L.Ed.2d 54, 90 S.Ct. 1563 (1970); *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); *Wilson* v. *Cook*, 327 U.S. 474, 90 L.Ed. 792, 66 S.Ct. 663 (1945). Petitioner has adequate means of presenting these issues to the Supreme Court of Mississippi at this time.[2] For that reason alone certiorari should be denied.

Further, petitioner has already sought relief in the federal courts. At her request a three judge federal panel has been impaneled in order to determine the constitutionality of Mississippi's abortion statute. There, the same petitioner now before this Court has presented the same argument and raised the same issues which she has now presented to this Court. The three judge federal panel has already heard arguments, however; at this time no decision has been rendered by that Court. The action before the three judge federal panel in the United States District Court for the Southern District of Mississippi, Western Division, is styled *Lea Spears* v. *John E. Ellis, District Attorney, Warren County, Mississippi, et al.*, Civil Action No. 1343(c). Respondent submits this is further grounds for the denial of the petition for writ of certiorari now before this Court.

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1. Section 2223, Mississippi Code 1942 Annotated (Supp. 1972).

2. Section 1992.5, Mississippi Code 1942 Annotated (1956).

Petitioner also contends that she was denied the right to confront witnesses against her. The trial record upon which petitioner was convicted clearly shows that Cynthia Ivy testified that she had voluntarily engaged in sexual intercourse and after missing two periods she suspected she was pregnant as her menstrual cycle had always been regular. Acting on that suspicion she visited the Bratley Clinic on May 14, 1969, to submit to a pregnancy test. The receptionist at the Clinic inquired as to where the results of the test should be sent and Cynthia Ivy informed her that the results should be sent to Dr. Calvin Hull. Miss Ivy then gave a urine specimen to a nurse. Miss Ivy also testified as to the circumstances under which the petitioner later performed an abortion upon her.

The State also called a Miss McMaster as a witness. She testified that she was a medical technologist employed at the Bratley Clinic and she testified as to her education, training and experience. She testified that she ran pregnancy tests on Miss Ivy's urine specimen and that the tests proved positive.

Dr. William F. Featherstone testified that he was a pathologist and testified as to his education, training and experience. He testified that Miss McMaster, a medical technologist, worked under his supervision and that she conducted a test on Miss Ivy's urine specimen. The results of the tests were turned over to him and his opinion, based upon the results of those tests, was that Miss Ivy was indeed pregnant. Dr. Featherstone also testified that the results of the tests were sent to Dr. Calvin Hull, Miss Ivy's physician.

Dr. Hull testified that he was an obstetrician and gynecologist. He had examined Miss Ivy in May of 1969, and he had received a report from the Bratley Laboratory concerning a pregnancy test which had been run upon Miss Cynthia Ivy. Dr. Hull also testified that he examined Miss

Ivy on May 26, 1969, and Miss Ivy was thereafter hospitalized for approximately three weeks. As a result of Dr. Hull's examination and treatment of Miss Ivy he was of the opinion that she had been pregnant prior to her coming to see him on May 26, 1969, and that she had had an abortion.

The petitioner now contends that she was denied the right to confront the witnesses against her in that the testimony of the receptionist was crucial on the issue of petitioner's guilt. However, petitioner did not attempt to call the receptionist as a witness, and the prosecution in no way prevented petitioner from so doing. Petitioner also claims that Dr. Hull testified from a report prepared by the medical technician based on tests following the abortion. There was only one statement made by Dr. Hull concerning tests made after the abortion and, there was no objection made to that statement. (R. 83) In any event that statement was brought out by petitioner's counsel.

The trial record clearly shows the petitioner was afforded every opportunity to cross-examine the state's witnesses. The technician who conducted the pregnancy test testified at petitioner's trial and was cross-examined by petitioner. The pathologist who testified at petitioner's trial in regards to the pregnancy test was thoroughly cross-examined by petitioner's counsel. The receptionist at the laboratory wherein the pregnancy test was conducted took no part in the making of the pregnancy test, and in any event, the petitioner could have called the receptionist as a witness. Dr. Calvin Hull, Miss Ivy's physician, was thoroughly cross-examined by petitioner. The prosecution in no way suppressed evidence or prohibited the petitioner from calling any witness or asking any questions.

Respondent respectfully submits the Petition for Writ of Certiorari should be denied in that the issues now raised

as to the constitutionality of Mississippi's abortion statute have not been submitted to the Supreme Court of Mississippi, that the same issues have been presented to a three judge federal panel by the petitioner and arguments have been made and briefs submitted in that case. The trial record clearly shows the petitioner was in no way denied any right to confront any witnesses against her.

Respectfully submitted,

A. F. SUMMER, Attorney General

By: TIMMIE HANCOCK
Special Assistant Attorney General

CERTIFICATE

I, Timmie Hancock, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, three copies of the foregoing Brief in Opposition to Honorable W. S. Moore, Attorney at Law, 514 Barnett Building, Jackson, Mississippi 39201; and three copies to Honorable Roland C. Lewis, Attorney at Law, 218 South President Street, Jackson, Mississippi 39201.

This the ..... day of ....., A. D., 1972.

TIMMIE HANCOCK
Special Assistant Attorney General